United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF FOR REHEARING EN BANC

75-7608

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

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P/S

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS EDMUND T. DELANEY AND EMANUEL CELLER ON REHEARING EN BANC

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REPLY BRIEF OF DEFENDANTS-APPELLANTS EDMUND T. DELANEY AND EMANUEL CELLER ON REHEARING EN BANC

Defendants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants") will not reply at length to the contentions set forth in the Brief of Plaintiffs-Appellees on Rehearing In Banc ("Plaintiffs' Brief"), since they believe that such a reply would necessarily consist, for the most part, of a repetition of their position as set forth in the Brief which they have already submitted.

This short Reply Brief will be limited to pointing out the incorrectness of the following specific statements or arguments made or referred to in Plaintiffs' Brief:

1. At pages 27-28, Plaintiffs-Appellees ("plaintiffs") in effect argue that since it will be necessary to utilize discovery procedures to ascertain the names and addresses of members of the class who must be given the class action notice under Rule 23(c)(2) Fed. R. Civ. P, it follows that the District Court should have the same discretion in allocating the costs of discovery procedures relating to notice that it has in allocating the costs of discovery procedures relating to the merits of a case. It is submitted that this entirely formalistic and artificial argument is a complete non-sequitur and plaintiffs cite no cases which support it. Plaintiffs' argument flies in the face of the decision of this court in Eisen III and the decision of the Supreme Court in Eisen IV that the "usual rule is that a

plaintiff must initially bear the cost of notice to the class" (Eisen IV, 417 U.S. 156, at page 178).

2. At page 34, plaintiffs quote the statement in Judge Hays' opinion, dissenting in part, to the effect that it was not an abuse of discretion for the district court to impose on the Fund the cost of culling out the names of members of the class because the district court found that this expense was "attributable to defendants' objections". For the reason set forth above, it is submitted that the imposition of this cost was not a matter within the discretion of the district court. In addition, it is submitted that, as pointed out in our Brief on Rehearing En Banc (at pages 4, 14, 15, 19, 20) it was unfair and unreasonable for the district court to impose this cost on the defendant Fund on the ground that it and the other defendants objected to eliminating from the class those persons who had sold their shares, because the district court had correctly ruled that such elimination would be arbitrary and improper and also because the evidence did not establish that the major portion of the cost of identifying members of the class was attributable to identifying those members of the class who had sold their shares.

3. In footnote"**" at the bottom of pages 36 and 37 of Plaintiffs' Brief, plaintiffs deny having stated that "they will not and cannot reimburse defendants [for the costs of notice] if defendants ultimately prevail". Plaintiffs assert that "in December 1973" they "indicated to the Court that they would not continue prosecution of the class action if they were

then required to pay the expenses involved in identifying the class members" (underscoring supplied) and that "They, of course, did not say at that time that if the defendants were ultimately to prevail, and if the district court, in its discretion, taxed these expenses against the plaintiffs, they would not and could not meet their legal obligations at the conclusion of the case." (underscoring in original quotation)

It is submitted that the following excerpt from the affidavit of Donald N. Ruby, sworn to the 12th day of December, 1973 (Appendix A-144, A-147) shows that plaintiffs are now attempting to confuse the issue by backing away from what their counsel stated under oath to the district court in 1973:

> "Secondly, if the description of the class is not modified so as to eliminate those persons who are no longer shareholders of the Fund, the cost of giving notice to the class (which would then be in excess of $20,000) would far exceed the amount that plaintiffs are in a position to afford and thus plaintiffs would be unable to continue prosecution of this consolidated action as a class suit to vindicate the rights of all those members of the class who purchased shares during the period March 28, 1968 to April 24, 1970 and are still shareholders of the Fund.*** Plaintiffs herein are not seeking by virtue of the procedure proposed by us to depart from the rules set forth in Eisen, (though we note, of course, that the rules laid down in Eisen relating to notice may be liberalized as a result of the Supreme Court's review of the case) but rather are requesting the Court to direct that notice be given in a manner consistent with the provisions of Rule 23 and the requirements of due process, which they will be able to afford." (underscoring supplied)

4. At page 43, plaintiffs state that under the District Court's decision they would bear "the full cost of sending out the notice to those members of the class who were no longer

shareholders of the Fund." While this statement is literally correct with respect to the cost of segregating and mailing "the envelopes going to the class members from the envelopes going to other Fund shareholders", any inference, based on plaintiffs' use of the word "full" before the word "cost", that the District Court required plaintiffs to bear the cost of identifying those members of the class who had sold their shares would be patently incorrect.

5. Finally, we are surprised that plaintiffs continue to imply that Eisen IV sanctions the imposition of notice costs on an alleged fiduciary by such references as: "In Eisen IV, however, the Supreme Court cited Dolgow v. Anderson, 43 F.R.D. 472,498-500 (E.D.N.Y. 1968), as an example of a case that might present such an exception to the usual rule. See Eisen IV, supra, at 178, fn 15." (Plaintiffs' Brief, page 40.)

In fact, as pointed out in the Unaffiliated Defendants prior brief at page 10, the Supreme Court in Eisen IV only cited Dolgow as a case which had been cited by the District Court for the proposition advanced by plaintiffs here. Indeed, the Supreme Court, after citing Dolgow in Eisen IV at page 178, footnote 15, went on to state in that same footnote that: "We, of course, express no opinion on the proper allocation of the cost of notice in such cases."

Moreover, plaintiffs' continued reliance on Dolgow as sound authority (see, e.g., Plaintiffs' Brief at pages 41-42) is equally surprising since, as was pointed out in the Unaffiliated Defendants' prior brief at page 11, the court's decision in

Dolgow was based on the concepts of allocating notice costs on the basis of relative ability to pay and on the basis of a preliminary determination on the merits. Both such concepts were rejected by the Supreme Court in Eisen IV, 417 U.S. 156, at pages 176-178.

CONCLUSION

This Court en banc should adhere to that portion of its decision filed June 30, 1976 which reversed the District Court's order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the members of the class.

Respectfully submitted,

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